Hastings Constitutional Law Quarterly

Volume 39
Number 4 *Summer 2012*

Article 6

1-1-2012

The Elephant in the Room: Gonduct, Groups, and Lawrence v. Texas

Elliot Wong

The Elephant in the Room: Conduct, Groups, and *Lawrence v. Texas*

by ELLIOT WONG*

Justice John Paul Stevens, a World War II veteran who served in Hawai'i, candidly admitted in a recent speech that upon seeing dozens of Japanese tourists at the USS Arizona memorial, standing above the thousands of dead American soldiers entombed therein, he had a strong, emotional reaction.[1] It was his first visit back to Pearl Harbor since his service there fifty years before, and he was unprepared for the extent of his visceral response. The first thoughts that flashed through his mind were, "[t]hose people don't really belong here. We won the war, they lost it. We shouldn't allow them to celebrate their attack on Pearl Harbor even if it was one of their greatest victories."[2]

Justice Stevens recounts that his outrage dissipated as he realized that the Japanese visitors must have been experiencing conflicting emotions as well, and that he was "drawing inferences about every member of the tourist group that did not necessarily apply to any single one of them."[3] Stevens' anger over an act that occurred on December 7, 1941, could not be justifiably applied to those Japanese tourists; to hold the Japanese people accountable for that infamous surprise attack just because they hailed from the same country would mean illegitimately attributing an act with a defining characteristic of a group. The broad, sweeping classifications he was making, and the resulting instinctive reactions, were irrational and unsustainable upon reflection.

---

* J.D. Candidate 2012, University of California, Hastings College of the Law; B.A. 2008, University of California, Davis, in Philosophy, Psychology, and Medieval Studies. I would like to thank Professor Elizabeth Hillman, Robert Smith, Jocelyn Wolf, and especially Bill Wong and Sarah Brann for their time and invaluable comments.

1. Justice John Paul Stevens, Address at the National Japanese American Memorial Foundation, 10th Anniversary Gala Celebration (April 3, 2012), http://njamf.com/jps%20speech.pdf.

2. *Id.* at 4.

3. *Id.*

Justice Stevens subconsciously used conduct to define a group—specifically, the attack on Pearl Harbor as a characteristic of Japanese nationality—but then took a step back to realize that the relationship between conduct and groups is not so simplistic. He cautioned against allowing our negative feelings to dominate our perceptions and interactions with different groups of people in our society, and has likewise opined from the bench that it is impermissible for the state to prohibit conduct because of the state's negative attitudes towards a group.[4] In 2003, the United States Supreme Court largely adopted this view in *Lawrence v. Texas*.[5] The Court found that a ban on homosexual sexual conduct had a meaningful and negative effect on the lives of homosexuals[6]—an effect significant enough to provide support that would ultimately help strike down the ban on the underlying conduct.[7]

Following *Lawrence*, courts and commentators alike have puzzled over the potential impact of the Court's sweeping language.[8] The *Lawrence* holding rests in large part on the adverse effect it has on homosexual persons.[9] But what did Texas' unconstitutional law really target? A group? Conduct? Or, are the two indistinguishable? Substantive due process is concerned with protecting the right to engage in certain conduct, but what role—if any—do groups play in how that conduct is judged?

There are numerous groups that are inherently tied to (and defined by) particular courses of conduct.[10] These conduct-defined groups exist primarily as the collection of individuals who engage in a particular course of conduct.[11] However, the law does not always consider the effects on a

4. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

5. *Lawrence*, 539 U.S. 558.

6. *Id.* at 575.

7. *Id.* at 578.

8. *See, e.g.*, John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 U. Fla. J.L. & Pub. Pol'y 401, 402 (2005) ("[Lawrence] illustrate[s] that the U.S. Supreme Court has failed to provide the guidance necessary to advance coherent decisionmaking in the lower federal courts . . . .").

9. *Lawrence*, 539 U.S. at 575 (The declaration of the immorality of homosexual conduct "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres . . . [and] demeans the lives of homosexual persons.").

10. The precise formulation of a conduct-defined group can be nuanced, taking into consideration wrinkles such as disposition, cognition, identity, habitualness, and degree.

11. This relationship between conduct and group is overly simplistic; but for present purposes, it is sufficient to note that while a conduct-defined group is based on a course of conduct, it need not be based *wholly* on it. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING

conduct-defined group when regulating its underlying conduct. Only certain groups play a key, albeit often implicit, role in how their defining conduct is judged. As the *Lawrence* decision illustrates, the Court remains cognizant of adverse impacts on certain conduct-defined groups, but only a small subset of all conduct-defined groups are actually given special consideration. This leads one to ask: Where have we drawn the line?

This Note argues that the relationship between the group and underlying conduct is the key to identifying conduct-defined groups that should be afforded special consideration. The distinction is as follows: Some groups evolve and exist beyond their defining conduct, while others exist solely as a means of identifying individuals who engage in a course of conduct. Groups that evolve receive special consideration by the Court, while the rest do not. Turning to *Lawrence*, homosexuals had originally been defined by reference to homosexual conduct, but by 2003, when the *Lawrence* case reached the Court, the group had become conceptually distinct from its defining conduct. Because the group had evolved in this manner, the Court implicitly acknowledged that it was appropriate to consider adverse impacts on the group when the Court weighed the legitimacy of the state's ban on homosexual sexual conduct. While this special consideration does not necessarily lead to invalidation of restrictions on conduct, it is nonetheless an important factor that may strongly favor invalidation.

Part I of this Note outlines the structure of rational-basis review within the substantive due process framework. Particular attention will be paid to the doctrine's efforts to protect conduct that implicates a liberty interest. This background provides a foundation for the subsequent discussion on the relationship between groups and conduct.

Part II addresses the treatment of conduct and groups in the *Lawrence* opinion. The positions taken by the petitioner, respondent, and the Court on this issue are particularly illuminating and provide compelling support for the distinctions this Note makes between conduct and groups. Then, Part II identifies the link that the Court makes between the regulation of conduct and the treatment of conduct-defined groups.

Part III articulates why the adverse effect on homosexuals should impact the regulation of homosexual conduct. Part III begins by separating groups defined by a course of conduct into two separate categories. While both are conduct-defined groups, differences among them result in contrasting treatment. The distinction turns on whether the conduct-defined group has become more than a mere label for individuals who

THE APARTHEID OF THE CLOSET 236–37 (1999) (arguing that homosexuals and other behavior-based groups are based both on a mix of cognition and conduct).

engage in a type of conduct. Groups that have are entitled to special consideration, under which adverse effects on the group may be considered. Groups that exist solely as a creature of the underlying conduct are not.

In order to distinguish between these two categories of conduct-defined groups, this Note identifies three principal features that suggest a group has developed beyond the underlying conduct: A fundamental understanding, a political voice, and a subculture and identity. The remainder of Part III briefly summarizes the history of homosexuals as a group, and concludes that at the time the Court considered *Lawrence*, the group had evolved well beyond the label for people who engage in homosexual conduct. Thus, the Court considered the adverse effects on homosexuals as a group, which the Court ultimately relied on to support the invalidation of the State's ban on conduct.

Part IV examines two other conduct-defined groups that have reached the Court under substantive due process—hippies, and physicians who assist with suicide—and distinguishes between those that exist beyond the defining conduct, and those that do not.

Finally, this Note concludes by contouring the treatment of this relationship between conduct and groups in a broader application. The treatment of other conduct-defined groups under the Court's First Amendment and Equal Protection jurisprudence will be briefly summarized.

I. Substantive Due Process

Substantive due process, in its modern form, is employed as a tool to protect a cluster of unenumerated, non-economic, personal interests[12] from governmental restrictions,[13] and have been loosely conceptualized as

12. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The modern formation of the substantive due process doctrine is conventionally distinguished from what has been termed the "*Lochner* era," in which substantive due process was primarily used to protect economic rights against state regulation. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) (prohibition on maximum hours bakery employees could work infringed the right to contract). However, it should be noted that decisions protecting non-economic rights in the *Lochner* era were not entirely absent. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (prohibition of teaching German to children infringed individual liberty interests, which includes rights to "acquired useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

13. Substantive due process only protects rights against infringement by a governmental actor, and cannot be used against infringement promulgated in the private sphere. DeShaney v. Winnebago Cnty. Dep't of Soc. Serv., 489 U.S. 189, 195 (1989) (purpose of due process is "to protect the people from the State, not to ensure that the State protect[s] them from each other").

privacy, autonomy, or personhood-related rights.[14] Government conduct can be struck down under substantive due process because it either impermissibly interferes with a fundamental right, is egregious enough to "shock[] the conscience,"[15] or is unsupported by a legitimate state interest that is rationally related to the government's conduct.[16]

The first substantive due process analysis is commonly known as "strict scrutiny,"[17] and is employed to protect fundamental rights from infringement.[18] But, "fundamental right" is an elusive term. The Court has used a general blueprint, under which it determines whether a right is fundamental, except that the test has been described in a variety of ways, and, as a result, the exact formulation is hard to articulate. The Court has developed several permutations on how it defines a fundamental right:

> [Fundamental rights are] rights that are "implicit in the concept of ordered liberty," or "deeply rooted in this Nation's history and tradition," or "so rooted in the traditions and conscience of our people as to be ranked as fundamental," or without which "neither liberty or justice would exist," or whose deprivation would "violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," or "those immutable principles of justice which inhere in the very idea of free government."[19]

However difficult it is to pin down the exact formulation, the Court's various descriptions do coalesce, and we are able to identify a common focus. Broadly speaking, a right is fundamental only if an examination of its history and tradition reveals qualities essential enough to necessitate broad protection.

Governmental regulations which burden rights that *lack* fundamental status are subject to a different channel for review. To categorize all remaining substantive due process cases involving the infringement of a non-fundamental right under a single heading would be a mistake, as there

14. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 838–39 (2003).

15. United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

16. *See, e.g.*, Ohio Bureau of Emp't Serv. v. Hodory, 431 U.S. 471, 489 (1977) (declining to strike down a statute on due-process and equal-protection grounds after applying rational-basis review).

17. Washington v. Glucksberg, 521 U.S. 702, 762 (1997) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

18. *Id.*

19. Rubin, *supra* note 14, at 841–42 (citations omitted).

are at least two distinct methods employed under which these remaining cases are analyzed: *Rochin*'s "shocks the conscience" test and rational-basis review.[20]

The prohibition against government conduct that shocks the conscience can be traced back to *Rochin v. California*, a 1952 case in which the Court held that certain government conduct was simply too egregious to comport with due process.[21] During a drug-related search of his home, Rochin swallowed several capsules to prevent police from obtaining them.[22] The officers attempted to extract the capsules by force, and after their efforts ended in failure, brought Rochin to a hospital and forcibly extracted the capsules.[23] After the capsules were recovered and tested, Rochin was convicted of possessing a preparation of morphine in violation of California law.[24] The *Rochin* Court noted that the government agents' attempt "to obtain evidence is bound to offend even hardened sensibilities,"[25] and employed methods ominously "close to the rack and the screw."[26] Broadly speaking, governmental conduct that offends both "a sense of justice" and "the community's sense of fair play and decency" violates the enigmatic principle of due process of law.[27]

The last form of substantive due process can be roughly categorized as rational-basis review. It explicitly emerged[28] in 1938 with *United States v. Carolene Products*,[29] which largely mirrors equal protection's rational-basis review. Under the *Carolene* Court's formulation of rational-basis review, the validity of the government's conduct or legislative enactment is

20. Professor Rubin argues that *Rochin*'s "shocks the conscience" test would be more properly categorized as a subset of strict scrutiny review, in that it involves "a fundamental right: the right against conscience-shocking government behavior." *Id.* at 846; *cf.* Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261 (1993) (arguing the *Rochin* test is applied so narrowly that it protects nothing beyond the scope of the Fourth Amendment). However, for present purposes, it is sufficient that the *Rochin* test is distinguished from the final category of rational-basis review.

21. Rochin v. California, 342 U.S. 165, 172 (1952).

22. *Id.* at 166.

23. *Id.*

24. *Id.*

25. *Id.* at 172.

26. *Id.*

27. *Id.* at 173.

28. *Cf.* James M. McGoldrick, *Katzenbach v. McClung: The Abandonment of Federalism in the Name of Rational Basis*, 14 BYU J. PUB. L. 1, 6 n.21 (1999) ("Claiming that the rational basis test begins with *Carolene Products* is true only in the sense that *Carolene* is a sign post case in which the rational basis test eclipsed the historically parallel reasonable basis test.").

29. United States v. Carolene Products, 304 U.S. 144 (1938).

"presumed," and can only be invalidated following a showing that the government's action "is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[30]

The modern formulation for rational-basis review is succinctly stated in *City of Cleburne v. Cleburne Living Center*,[31] and consists of three main propositions.[32] First, the challenged "legislation is presumed to be valid."[33] The challenger bears the burden of proof to demonstrate unconstitutionality. Second, the government must have a "legitimate state interest" to enact the legislation.[34] Finally, the legislation and the state's interest must be "rationally related."[35] Thus, it falls on the challenger to prove the latter two elements are lacking. In order to mount a successful challenge, it must be established that the government lacks either a legitimate state interest, or that the state's interest lacks a rational relationship to the government's conduct.

But rational-basis review is a fickle mistress, and *Carolene*'s formulation of the standard has since mutated into "two sets of rationality cases, one deferential and one heightened, operating as if in parallel universes with no connection between them."[36] This trend is hardly unique; scholars and judges alike have criticized these systems of tiered review for their tendency to continually spawn new deferential standards,[37] resulting in a doctrine that consists of something akin to a continuum rather than tiers.[38] The late Justice Thurgood Marshall was particularly vocal over the perceived failings of tiered review, and expressed concern over "the danger, that . . . relevant factors will be misapplied or ignored."[39]

30. *Id.* at 152–53 (citing Metro. Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935)).

31. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). Although Cleburne involved the application of rational-basis review, the challenge was brought under the Fourteenth Amendment's equal protection clause, not its due process provision.

32. *Id.* at 440 (applied equal protection rational-basis review and struck down a city ordinance that effectively precluded the establishment of a group home for the mentally retarded).

33. *Id.*

34. *Id.*

35. *Id.*

36. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term through Romer v. Evans*, 32 IND. L. REV. 357, 358 (1999).

37. From the "strictest" strict scrutiny, *Washington v. Davis*, 426 U.S. 229, 242 (1976), to the "most minimal" rational-basis, *Cleburne*, 473 U.S. at 458.

38. *See* Rubin, *supra*, note 14, at 833–34; Neelum J. Wadhwani, *Rational Reviews, Irrational Results*, 84 Tex. L. Rev. 801, 801 (2006); *see also* Interview by Professor Calvin Massey with Justice Antonin Scalia, Senior Assoc. Justice of the U.S. Supreme Court, in S.F., California (Sept. 17, 2010), http://uchastings.edu/legally-speaking/scalia.html.

39. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).

Ultimately, Marshall concluded that "two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken or should undertake . . . ."[40] In his view, a rigid two-tiered framework fails to capture the sophistication of the proper inquiry: "All interests not 'fundamental' . . . are not the same; and it is time for the Court to drop the pretense that . . . they are."[41]

II. The *Lawrence* Decision

In *Lawrence*,[42] police responded to a reported weapons disturbance at Lawrence's apartment, and upon entering found two adult men engaging in a private and consensual sexual act.[43] No weapons were found, but the two men were arrested, held overnight, and convicted of violating a Texas law barring "homosexual conduct," which specifically provided that it was illegal for a person to "engage[] in deviate sexual intercourse with another individual of the same sex."[44]

The *Lawrence* court begins its analysis with a discussion of the development of the fundamental right to privacy, navigating its way from an earlier and indistinct formulation of the right framed in broad terms[45] to *Bowers v. Hardwick*,[46] a case in which the court declined to apply the right of privacy to invalidate a similar Georgia sodomy statute.[47] But the *Lawrence* Court (arguably channeling Justice Marshall's criticism against viewing fundamentality as a rigid dichotomy) criticized *Bowers*' application of substantive due process, stating that by limiting its inquiry to "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,"[48] *Bowers* "fail[ed] to appreciate the extent of the liberty interest at stake" in homosexual conduct. Indeed, after rejecting homosexual conduct as a fundamental right, the *Bowers* Court

40. *Id.* at 318.

41. *Id.* at 321.

42. Lawrence v. Texas, 539 U.S. 558 (2003).

43. *Id.* at 562–63.

44. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003), *invalidated by Lawrence*, 539 U.S. 558.

45. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

46. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

47. *Bowers*, 478 U.S. at 189–90.

48. *Lawrence*, 539 U.S. at 566 (quoting *Bowers*, 478 U.S. at 190).

flippantly declined[49] to invalidate the Georgia statute under rational-basis review in one brief paragraph.[50]

While the *Lawrence* Court seems to flirt with the possibility of finding that the fundamental right to privacy encompasses private homosexual conduct,[51] it never makes the final leap. Rather than directly opine on the fundamentality of the right at issue,[52] the Court turns its attention to the nature of the state's interest in an implicit shift into rational-basis analysis.[53]

It is *Lawrence*'s[54] subsequent treatment of Texas Penal Code section 21.06 ("section 21.06") under rational-basis review that contains the substance of the opinion. Recall the contours of rational-basis review—legislation is held unconstitutional if the challenger can establish that there is no rational relationship to a legitimate state interest.[55] While a showing of the illegitimacy of the state's interest *or* the absence of a rational relationship between the state's interest and the legislation is enough to invalidate a statute, the *Lawrence* Court disposes of the case under the first prong: Section 21.06's prohibition against homosexual conduct "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[56]

The scope of the prohibition plays a crucial role, which bears close examination. In its brief, Texas began to frame the scope of the case by identifying the extent of the State's regulation.[57] Texas's purported interest was "the State's long-standing moral disapproval of homosexual *conduct*, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals."[58] Texas asserted that section 21.06 was within the state's authority to enact a statute banning "an act,"[59] which is "facially applicable to both persons of

49. ESKRIDGE, *supra* note 11, at 150.

50. *Bowers*, 478 U.S. at 196.

51. *Lawrence*, 539 U.S. at 564–66, 567–74 (examining the scope of the privacy right and rejecting *Bowers'* analysis concerning a history and tradition condemning a right of private, homosexual conduct).

52. *See id.* at 586 (Scalia, J., dissenting).

53. *Id.* at 575.

54. *Id.* at 573–79.

55. *See* Romer v. Evans, 517 U.S. 620, 623 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

56. *Lawrence*, 539 U.S. at 578.

57. *Id.* at 3.

58. Brief for Respondent at 41, 42–48, *Lawrence*, 539 U.S. 558 (No. 02-102) (emphasis added).

59. *Id.*

exclusively homosexual orientation and persons who regard themselves as bisexual or heterosexual."[60] The state took a "hate the sin and not the sinner" approach, and expended great pains to differentiate homosexual conduct and homosexuals, stating that "[i]t is the homosexual conduct that is viewed as immoral,"[61] and arguing that section 21.06 makes no classification on the basis of sexual orientation[62] by only criminalizing a specified "course of conduct."[63]

Consider the petitioners' alternative framing. Even though the Court rejected the state's position, it did not wholeheartedly embrace the petitioners' counterargument. The petitioners asserted that regulation of an act was indistinguishable from regulation of the group of individuals who, by definition, engaged in that act,[64] explaining that "[t]he group targeted and harmed by the Homosexual Conduct Law is, of course, gay people."[65] And, even though the petitioners acknowledged that the trial record was devoid of any evidence of Lawrence and Garner's sexual orientations,[66] they emphasized the homosexual relationship between the two and the role of the relationship in defining individual identity and orientation.[67]

The Court endorsed neither the state's proffered dichotomy, nor petitioners' alternative of banishing the distinction altogether. Instead, the Court concluded that the prohibition on conduct had a direct and substantial effect on the individuals who engaged in the prohibited act.[68] The relationship between conduct and group is made explicit, but the distinction is also nominally maintained: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[69] In the Court's view, conduct and group remain conceptually distinct, yet intimately associated.

---

60. *Id.* at 5.

61. *Id.* at 45–46.

62. If it were acknowledged that criminalization under section 21.06 was conditioned on the "status" of the actor (i.e., his or her sexual orientation), the statute may be vulnerable to invalidation under the Eight Amendment's cruel and usual punishment prohibition on "status crimes." *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (California law struck down that made it a crime for a person to be addicted to the use of narcotics).

63. Brief for Respondent, *supra* note 58, at 35.

64. Reply Brief at 2, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief for Petitioner at 32–33, *Lawrence*, 539 U.S. 558 (No. 02-102).

65. Brief for Petitioner, *supra* note 64, at 33.

66. Reply Brief, *supra* note 64, at 2.

67. *Id.* at 5.

68. *Lawrence*, 539 U.S. at 575.

69. *Id.*

We are left somewhere between the parties' two extremes. The regulation of an act will certainly affect the group of individuals who engage in the act, but regulation of a course of conduct is distinguishable from an attack based on the status of the offending group. The Court differentiates between conduct and the affected group using a cause-and-effect relationship, which the Court posits in terms of a morally "justified" restriction on conduct that results in social stigma directed towards the group for having engaged in a criminal act.[70]

It is difficult—if not impossible—to define homosexuals, bisexuals, and heterosexuals without reference to sexual conduct.[71] After all, the defining characteristic of homosexuality is homosexual conduct, or at least the disposition to engage in homosexual conduct.[72] The same can be said for any grouping that is, at heart, based on conduct. But once we take into account how we classify these groups, we encounter a problem. A prohibition on conduct will always have a detrimental effect on the group that is comprised of those who engage in the prohibited conduct, simply by definition. Thus, we can see a chicken-and-the-egg problem begin to emerge. A prohibition on homosexual conduct is invalidated in part because of the detrimental effect it has on homosexuals, but the group functionally exists as a collection of individuals who engage—or are disposed to engage—in the conduct. If we are to follow this logic, the distinction between conduct and groups begins to blur, if not vanish entirely, and this tautology widens the scope of the Court's reasoning to potentially reach any state-imposed prohibition on conduct.

It would be absurd to equate conduct-defined groups with their underlying conduct and universally disapprove of all prohibitions on conduct. This conclusion is precluded by the language of the *Lawrence* decision itself; the Court does, in fact, maintain the distinction between conduct and conduct-defined groups. How far, then, does the Court's reasoning extend? The remainder of this Note will attempt to articulate a solution. As we shall see, this problem provides the key to clarifying the scope of *Lawrence*'s holding and identifies when special concern will be shown towards a conduct-defined group.

---

70. *Id.*

71. ESKRIDGE, *supra* note 11, at 172. *See, e.g.*, Reply Brief, *supra* note 64, at 33 (citing Romer v. Evans, 517 U.S. 620, 624 (1996)) (defining sexual orientation as the disposition or decision of which gender to engage in sexual acts with).

72. ESKRIDGE, *supra* note 11, at 71 ("Homosexual identity is defined by presumptions about homosexual conduct.").

III. Evaluating Homosexuals as a Conduct-Defined Group

While there can be no question that homosexual sexual acts are a defining characteristic of homosexuality, we must ask: Is there more to the grouping than a course of sexual conduct? If a group is distinguishable from its defining conduct, then (1) an intimate relationship between group and conduct is preserved, and (2) the *Lawrence* concern will be judiciously reserved for a deserving subset of conduct-defined groups.

Following *Lawrence*, a principled distinction has arisen. Where a conduct-defined group arises from associated conduct, courts should not normally consider adverse effects on the group. However, courts should consider adverse effects on a conduct-defined group when the group has developed to a point where it is conceptually distinct from the underlying conduct. If so, the group becomes more like an independent social classification, rather than a mere label for participating in a course of conduct. Regarding homosexuals, the answer seems clear. While homosexuals may be identified by homosexual conduct, the group has evolved beyond the original identifying course of conduct into a full-fledged component of society.

Three principal features that, when all are present, indicate that a group exists beyond the defining course of conduct: (1) a fundamental understanding of the group, (2) the development of the group's political voice, and (3) the emergence of the group's subculture and identity. These three features are rough categories that capture the most salient concerns expressed by the Court when evaluating the relationship between conduct and groups. Even though these features should be kept conceptually distinct, they occasionally overlap. The remainder of Part III analyzes these three features with respect to homosexuals, and demonstrates that, as a conduct-defined group, homosexuals exist apart from a course of underlying homosexual conduct.

A. A Fundamental Understanding

We begin with society's basic understanding of the group. This element is meant to capture our understanding of the underlying behaviors, causes, and individuals who engage in the conduct. The inquiry will often involve an interdisciplinary inquiry, relying on a mix of psychology, sociology, biology, and history. The way in which we understand the individuals who engage in a course of conduct is indicative of how we judge the underlying association between the conduct and the individuals. It also may bear on the group's attributed *mens rea*, likely treatment by society at large, and level of ostracism or acceptance. In short, it provides a

useful litmus test for judging the level of conceptual separation between group and conduct.

The *Lawrence* Court notes that "homosexual[s] as a distinct category of person[s] did not emerge until the late 19th century,"[73] and that the modern grouping "d[id] not apply to an era that had not yet articulated [the distinction between homosexuality and heterosexuality]."[74] Roughly contemporaneous with the identification of the group was a "concerted scientific investigation" into homosexuality.[75] And, even though any scientific understanding was only in its infant stages, a sharp divide quickly emerged between "those who saw [homosexuality] as an acquired characteristic and those who viewed it as inborn."[76] In this early period, the school of thought that viewed homosexuality as an inborn characteristic dominated its rival, despite general contemporary tendencies to assign culpability to the free will of an individual.[77] Even so, the basic understanding of homosexuality was extremely crude, as "[n]ewly discovered facts did little to frame the understanding of homosexuality" because "it was the perspective on homosexuality that determined the meaning of those facts."[78] Many theories viewed homosexuality as a "profound deviation from the normal pattern of human sexuality."[79]

It was not until the twentieth century that any major conceptual shifts occurred in the way homosexuality was understood. Importantly, psychoanalysts—including Freud himself at the turn of the century—began viewing homosexuality as a normal end of psychosexual development rather than a pathological congenital degeneration, distancing homosexuality from a willful (and hence individually culpable) deviation from sexual norms.[80] After the waning of the psychoanalysts' influence in the middle of the twentieth century, however, homosexuals were almost uniformly viewed as a group suffering from a pathological condition.[81] In the American Psychiatric Association's first publication of the Diagnostic and Statistical Manual ("DSM"), a comprehensive compendium of mental

73. *Lawrence*, 539 U.S. at 568.

74. *Id.* (quoting J. D'EMILIO & E. FREEDMAN, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997)).

75. RONALD BAYER, Homosexuality and American Psychiatry: The Politics of Diagnosis 19 (1987).

76. *Id.*

77. *Id.*

78. *Id.* at 21.

79. *Id.* at 20.

80. Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 509 (2002).

81. BAYER, *supra* note 75, at 38.

disorders, homosexuality was listed as a sociopathic personality disturbance.[82]

The psychiatric perspective was first challenged by Alfred Kinsey in 1948,[83] and again by Clellan Ford and Frank Beach three years later.[84] Kinsey examined sexual conduct of American males and discovered sexual behavior existed along a continuum—not in a strict dichotomy of homo- and heterosexuality.[85] Ford and Beach investigated both cross-cultural practices as well as non-human primates, and concluded that homosexual conduct was part of our "fundamental mammalian heritage."[86] They explicitly rejected the universality of orthodox American sexual norms.[87] Then in 1957, a study by Evelyn Hooker compared homo- and heterosexual men, and concluded that there was no correlation between sexual orientation and social determinism of sexuality.[88]

As more research came to light,[89] the pathological status that homosexuality had acquired was ultimately abandoned by the American Psychiatric Association in the third edition of the DSM (following a protracted debate within the psychiatric community).[90] Other communities of mental health experts have similarly come to the consensus that research has demonstrated that homosexuality is a normal variation of human sexuality.[91]

More recently, evidence has emerged to support the theory that sexual orientation is "more acontextual than other features of one's personality."[92]

---

82. AM. PSYCHIATRIC ASS'N, Diagnostic and Statistical Manual, Mental Disorders 34 (1952).

83. ALFRED KINSEY ET AL., Sexual Behavior in the Human Male (1948).

84. CLELLAN S. FORD & FRANK A. BEACH, Patterns of Sexual Behavior (1951).

85. KINSEY ET AL., *supra* note 83, at 638.

86. FORD & BEACH, *supra* note 84, at 259.

87. Id.

88. Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHNIQUES 18–31 (1957).

89. *See* BAYER, *supra* note 75, at 101–54.

90. AM. PSYCHIATRIC ASS'N, Diagnostic and Statistical Manual, DSM-III (1980).

91. *See, e.g.*, AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf; ROYAL COLL. OF PSYCHIATRISTS, SUBMISSION TO THE CHURCH OF ENGLAND'S LISTENING EXERCISE ON HUMAN SEXUALITY (2007), *available at* http://www.rcpsych.ac.uk/pdf/Submission%20to%20the%20Church%20of%20England.pdf. *Cf.* STANTON L. JONES & MARK A. YARHOUSE, Homosexuality: The Use of Scientific Research in the Church's Moral Debate (2000) (arguing that while homosexuality is no longer a mental illness, whether or not it is a psychopathology should be viewed as an unsettled question).

92. ESKRIDGE, *supra* note 11, at 284–85.

The basis may be biological, hormonal, or genetic, but it seems increasingly probable that sexuality is hardwired.[93] Beginning in the 1990s, D.F. Swaab found that a portion of a homosexual male's brain was structurally different from a heterosexual brain.[94] Other studies have reported similar differences in homo- and heterosexual brain structures.[95] Twin studies[96] and X–linked generational studies[97] also suggest a biological or genetic link.

Our fundamental understanding of homosexuality has increased dramatically within the last few decades. While it must be conceded that the debates within various fields are far from over, a major paradigm shift has already occurred. Homosexuality is no longer solely viewed through the grubby lens of unfounded, qualitative judgment. We increasingly avoid the concept of a willful and deviant culpability, and have used the tools from a variety of disciplines to understand homosexuality as a natural sexual expression. As this brief summary can attest, a true fundamental understanding has only recently come to light. The way we understand the group—why individuals perform or are disposed to perform a course of underlying conduct—has enormous implications on the resulting treatment of that group, and provides a useful method to discern how our society views the relationship between group and conduct.

B. A Political Voice

Our fundamental understanding of homosexuality can influence societal views, but understanding is an insufficient indication that a group is conceptualized independently from its defining conduct. Some form of

---

93. *Id.*

94. D.F. Swaab, *Development of the Human Hypothalamus*, 20 Neurochem Res. 509–19 (1995) (finding a difference between the size of the hypothalamus in heterosexual and homosexual brains). *See also* D.F. Swaab, *Sexual Differentiation of the Human Brain: Relevance for Gender Identity, Transsexualism and Sexual Orientation*, 19 GYNECOL. ENDOCRINOL. 301 (2004) ("Solid evidence for the importance of postnatal social factors is lacking.").

95. *See, e.g.*, Laura S. Allen & Roger A. Gorski, *Sexual Orientation and the Size of the Anterior Commissure in the Human Brain*, 89 PROC. NAT'L ACAD. SCI. USA 7199–202 (1992) (finding a difference in the anterior commissure). *Cf.* William Byne, *Science and Belief: Psychobiological Research on Sexual Orientation*, 28 J. HOMOSEX. 303–54 (1995) (expressing doubt over the significance of brain size differences).

96. *See, e.g.*, J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCH. GEN. PSYCHIATRY 1089–96 (1991) (finding marked differences in occurrences of homosexual orientation between monozygotic twins, dizygotic twins, and adoptive brothers).

97. *See, e.g.*, D.H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 Sci. 321–27 (1993) (finding larger numbers of homosexual men in maternal lineages that possess certain markers on gene Xq28).

wider, societal acknowledgement is also necessary.[98] The level of acknowledgement need not be high or reach a level of pervasive acceptance, as the Court has regularly struck down legislation that infringed on rights of marginalized minority groups under rational-basis review despite widespread disapproval.[99] All that is required is a low-threshold indicator for public acknowledgement: the presence of a political voice. The presence of a political voice suggests that the conduct-defined group has begun to coalesce, meaning that group members may also associate with one another for alternative political purposes. Group cohesion typically increases and the conceptual separability between conduct and group becomes increasingly apparent.

It was only in the latter half of the twentieth century that homosexuals developed some form of political voice. In the nineteenth and early twentieth centuries, several influential figures began to articulate the view that the prohibitions against homosexual conduct should be relaxed,[100] and that homosexuality was a normal expression of human sexuality.[101] But these early voices were those of physicians, philosophers, and lawyers speaking in a professional capacity—voices from outside the group itself.

One commentator has noted that "[u]nlike most other potentially political groups, gay people are . . . disempowered by virtue of being born as if into a diaspora—probably randomly distributed about the population at birth."[102] In addition, homosexuals lack a mechanism for generational transmission of identity.[103] Thus, it comes as no surprise that the development of homosexual communities occurred only slowly.[104] In the years prior to World War II, a few fleeting organized groups of homosexuals existed, but they exerted little influence and proved to be

98. ESKRIDGE, *supra* note 11, at 229 ("[C]ompletely powerless minorities [are rarely protected]; instead, the Court tends to protect previously powerless groups once it has become clear that the group is politically mobilized and potentially a partner in the pluralist system.").

99. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (homosexuals); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (hippies); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (mentally handicapped); Plyer v. Doe, 457 U.S. 202 (1982) (children of illegal immigrants).

100. *See, e.g.*, Jeremy Bentham, *Offences Against One's Self, in* 3 J. Homosexuality 389–405 (Louis Crompton ed., 1978).

101. *See, e.g.*, EDWARD CARPENTER, The Intermediate Sex (1912).

102. Kenneth Sherrill, *Political Power of Lesbians, Gays, and Bisexuals*, 29 PS: POL. SCI. & POL., 469, 469 (1996). *See also* RICHARD POSNER, Sex and Reason 298–99 (1992).

103. Sherrill, *supra* note 102, at 469.

104. BAYER, *supra* note 75, at 70.

short-lived.[105] In the years after the war, things were not much changed. Professor Eskridge argues:

> The anonymity of homosexuals in the 1950's was key to their political marginalization and contributed to antihomosexual stereotypes; because folks did not realize that their friends and relatives were gay, they were more likely to believe that homosexuals were lonely, psychopathic, and dysfunctional. Closetry disabled gay people from forming social and political groups and thereby enabled homophobes to persecute gay people virtually at will.[106]

After Kinsey published his research, more lasting homosexual groups began forming.[107] Several among them (notably the Mattachine Society in 1950 with its *Mattachine Review*, and the Daughters of Bilitis in 1953 with its *Ladder*) began publication of journals,[108] which provided an early platform in which various within-group viewpoints could be expressed.[109]

In the 1960s, homosexual groups became more politically active.[110] Many groups shifted their focus from abstract theoretical interests to more tangible goals of equality and acceptance.[111] Viewpoints began to coalesce and political organization became possible, spurred on in part by the grander civil rights movement.[112] But not until the 1969 Stonewall Riots did homosexual political activism emerged in any significant form.[113] Following a police raid on a gay bar in New York City's Greenwich Village, a large-scale protest ensued, attracting nationwide attention and providing a tipping point that facilitated a wider dissemination of a homosexual political voice.[114]

---

105. LAUD HUMPHREYS, Out of the Closets 50 (1972). The Society for Human Rights, established in 1924 and disbanded only a few months later, is considered the first American homosexual rights organization. DAVID BIANCO, Gay Essentials: Facts for Your Queer Brain 75 (1999).

106. ESKRIDGE, *supra* note 11, at 306.

107. BAYER, *supra* note 75, at 69, 73.

108. Early homosexual journals often ran into trouble with obscenity laws. *See, e.g.*, Roth v. U.S., 354 U.S. 476 (1957) (homosexual publication *ONE: The Homosexual Magazine* held not to have been obscene and entitled to First Amendment protection).

109. BAYER, *supra* note 75, at 73.

110. *Id.* at 81–82.

111. *Id.* at 82–84.

112. *Id.* at 88–89.

113. *Id.* at 92.

114. *See* David Carter, Stonewall: The Riots that Sparked the Gay Revolution (2004).

The presence of a homosexual political voice gradually increased during the 1970s, achieving the election and appointment of several openly gay officials,[115] as well as occasional legislative successes.[116] But the AIDS pandemic in the 1980s, and its early prevalence among homosexual men, ushered in an enormous resurgence of political opposition.[117] Laws and exclusionary administrative rules followed,[118] coupled with a new wave of public antipathy.[119] The AIDS pandemic served to decrease drastically the level of political voice homosexuals had, as well as the basic understanding of the group. The as-yet completely unknown disease and its association with homosexuals suggested the realization that an understanding of homosexuality could be deficient in some major way. This forced society and the group itself to reexamine their attitudes towards homosexuality,[120] culminating in *Bowers v. Hardwick*,[121] in which the Court upheld Georgia's anti-sodomy statute in 1986. Nonetheless, there were still some legal and political successes.[122]

115. Kathy Kozachenko to the Ann Arbor, Michigan City Council in 1974, Elaine Noble to the Massachusetts Legislature in 1975, Harvey Milk to the San Francisco Board of Supervisors in 1978, and Hon. Stephen Lachs to the Los Angeles County Superior Court in 1979.

116. E.g., the defeat of Proposition 6 in California ("the Briggs initiative") in 1978, which would have made it mandatory to fire any public school employee who was either homosexual, or who supported homosexual rights; the establishment of anti-discrimination laws such as the Aspen, Colorado ordinance, which was the subject of *Romer v. Evans*. ASPEN, COLO., MUN. CODE § 13-98 (1977) (cited in Romer v. Evans, 517 U.S. 620, 624 (1996)). *See also* Robinson v. Shapp, 350 A.2d. 464 (Penn. 1976) (governor's executive order directing state agencies not to discriminate based on sexual preference held to be beyond jurisdiction of the judiciary, absent proof it was otherwise contrary to law). *Cf.* Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458 (1979) (California's Fair Employment Practice Act does not encompass discrimination on the basis of sexual orientation); Macauley v. Judicial Court of Mass., 397 N.E.2d 670 (Mass. 1979) (Massachusetts's employment antidiscrimination law held to not include discrimination based on homosexuality), *superseded by statute*, 27 Mass. L. Rep. 254 (2010).

117. BAYER, *supra* note 75, at 197–200.

118. *See, e.g., id.* at 201 (Public Health Service excluded homosexual men from blood donor pool). *See also* Racine Unified Sch. Dist. v. Labor & Indus. Review Comm'n, 476 N.W.2d 707 (Wisc. Ct. App. 1991) (struck down school district policy of placing staff members who acquired AIDS on mandatory sick leave or leave of absence); Under 21, Catholic Home Bureau for Dependent Children v. New York, 482 N.E.2d 1 (N.Y. 1985) (invalidated the Mayor of New York City's executive order that prohibited discrimination by city contractors on the basis of sexual orientation); Hinman v. Dep't of Pers. Admin., 167 Cal. App. 3d 516 (1985) (denial of dental benefits under State Employees' Dental Care Act upheld).

119. BAYER, *supra* note 75 at 205.

120. *Id.*

121. Bowers v. Hardwick, 478 U.S. 186 (1986).

122. See, e.g., the other two anti-discrimination ordinances at issue in *Romer v. Evans*: BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-11 (1987); DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-91 to 28-116 (1991) (cited in Romer v. Evans, 517 U.S. 620, 624 (1996)). *See also* Rolon v. Kulwitzky, 153 Cal. App. 3d 289 (1984) (Los Angeles municipal ordinance precluding

As understanding of the AIDS virus increased and the methods of its sexual transmission were finally discovered,[123] a homosexual political presence was once again waxing in the 1990s. But homosexual political influence was still tepid. One commentator remarked in 1996 that homosexuals "are outnumbered and despised. . . . Their quest for political power is disadvantaged by barriers to the formation of political community as well as by lack of access to significant power resources."[124] And while inroads were made in anti-discrimination legislation,[125] other anti-homosexual legislation, federal and state, was also on the rise.[126] Particularly noteworthy examples include the "Defense of Marriage Act,"[127] "Don't Ask, Don't Tell,"[128] and Colorado's "Amendment 2" (a state constitutional amendment that repealed all existing anti-discrimination ordinances and precluded any future action designed to protect homosexuals, later invalidated in *Romer v. Evans*).[129] In the years

discrimination in business practices held to prevent restaurant from refusing a lesbian couple service); Hubert v. Williams, 133 Cal. App. 3d Supp. 1 (1982) (held that landlord cannot refuse to rent an apartment because of a tenant's sexual preference under California's Unruh Act); People v. Onofre, 51 N.Y.2d 476 (1980) (struck down New York's criminal prohibition on homosexual sodomy); CONN. GEN. STAT. ANN. § 46a-81c (West 1991) (prohibits discrimination on the basis of sexual orientation for employment).

123. *See, e.g.*, Doe v. D.C. Comm'n on Human Rights, 624 A.2d 440 (D.C. 1993) (distinguishing between discrimination based on sexual orientation and on a perceived handicap as an HIV carrier).

124. Sherrill, *supra* note 102, at 469.

125. *See, e.g.*, Nacinovich v. Tullett & Tokyo Forex, Inc., 257 A.D.2d 523 (N.Y. Sup. Ct. App. Div. 1999) (claim of discrimination based on sexual orientation was viable under City Human Rights Law, but not under State Human Rights Law); Howard Univ. v. Green 652 A.2d 41 (D.C. 1994) (citing D.C. CODE § 1-2512 (1981)) (D.C. Human Rights Act's sexual orientation provision meant to ensure that homosexuals enjoy equal rights previously denied to them); Exec. Order No. 13087, 63 Fed. Reg. 30097 (June 2, 1998).

126. *See, e.g.*, 1 U.S.C. § 7 (1996) and 28 U.S.C. § 1738C (1996) ("the Defense of Marriage Act"); 10 U.S.C. § 654 (1993) ("Don't Ask, Don't Tell") (repealed 2010). *See also* Flynn v. Hillard, 707 N.E.2d 716 (Ill. App. Ct. 1999) (Illinois's Human Rights Act did not prohibit discrimination based on sexual orientation); Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. 1998) (upheld referendum amendment to city charter that eliminated employee benefits for domestic partners); Rutgers Council of AAUP Chapters v. Rutgers, The State Univ., 689 A.2d 828 (N.J. Super. Ct. 1997) (New Jersey's Law Against Discrimination does not bar denial of health benefits to same-sex domestic partners); City of Atlanta v. McKinney, 454 S.E.2d 517 (Ga. 1995) (upheld invalidation of jail registry and employee benefit ordinances that prohibited discrimination based on sexual orientation); Ross v. Denver Dep't of Health & Hosp., 883 P.2d 516 (Colo. Ct. App. 1994) (Career Service Authority Rule doesn't prohibit denial of sick leave benefits on the basis of sexual orientation); Barbour v. Dep't of Soc. Serv., 497 N.W.2d 216 (Mich. Ct. App. 1993) (discrimination based on sexual orientation was not proscribed by Michigan Civil Rights Act).

127. 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

128. 10 U.S.C. § 654 (repealed 2010).

129. Romer v. Evans, 517 U.S. 620 (1996).

immediately preceding the *Lawrence* decision, opinions differed as to the level of political influence homosexuals exerted, but some level of political organization was apparent.[130]

A political voice is a distinctive feature of conduct-defined groups not because it allows a platform from which the group can advance its conduct-related goals, but rather because political activity requires that the group organize and gain depth as it considers issues incidental to and even beyond the regulation of the group's underlying conduct, enabling it to become a "potential[] partner in the pluralist system."[131] Issues incidental to the regulation of the conduct are taken up, and as the group's political voice solidifies, the group may evolve to confront tertiary issues that may be only indirectly or entirely unrelated to the regulation of the group's underlying conduct. Homosexual political influences have waxed and waned, but one thing remains clear from an examination of a brief history of the group's involvement in politics: Homosexuals have established a political voice that was far from insignificant by the time the *Lawrence* Court reexamined the issue in 2003. Treatment of conduct-defined groups has certainly been influenced by whether they are nominal participants in our political system; those that have been able to provide some degree of influence and context, further distancing the group from a mere label used to define a course of conduct.

C. Subculture and Group-Identity

The last major feature of a group that exists beyond the confines of a defining conduct is the emergence of a subculture and group identity. As additional identifying features and secondary characteristics of the group begin to emerge, the group steps further beyond the core defining conduct. The development of subculture and identity indicate that the conduct-defined group has begun to coalesce around cognitive aspects of status, rather than remain a synonym for conduct.[132]

Homosexual identity has been referred to as "an umbrella concept that brings together many elements and categories that are contingently and historically (as opposed to analytically or inherently) related."[133] This last factor is often the easiest to analyze, and from the historical discussion

130. *Compare* Sherrill, *supra* note 102, at 469 (emphasizing the "relative political powerlessness" of homosexuals), *with Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (describing homosexuals as "a politically powerful minority").

131. ESKRIDGE, *supra* note 11, at 229.

132. *Id.* at 236–37.

133. Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 324 (2009) (citing DAVID M. HALPERIN, How to Do the History of Homosexuality 109 (2002)).

above, the emergence of a homosexual subculture and identity seems almost inevitable. One aspect, however, bears additional discussion: distinguishing the construction of homosexual identity by internal and external pressures.

Early homosexual identity was almost entirely constructed externally—that is, by society at large. Already in the late nineteenth century, perceived stereotypical characteristics were quite common. This should come as no surprise because early homosexual identity was a branded grouping.[134] Stereotyping was commonly used as a method of identifying features by proponents of gender inversion.[135] According to this theory, homosexuality inverted the sexual role, which resulted in the expectation that homosexuals would "perform[] acts and feel[] emotions that were regarded by society as exclusively the domain of the other gender."[136] This kind of stereotyping was quite common primarily because up until the civil rights movement in the 1960s, the group itself made no serious or widespread efforts to establish a counter-viewpoint.[137]

Perceived effeminacy in homosexual men (and the inverse in homosexual women) has been suggested as the most prominent secondary characteristic,[138] other behaviors, interests, and demeanors have also been associated with the group.[139] For example, Judge Posner suggests that homosexuals may possess disproportionate artistic creativity,[140] and David Halperin suggests that passivity is among the primary set of elements that comprises homosexual identity.[141] Other commonly attributed accompanying aspects include physical weakness, promiscuity, gravitation towards certain occupations, concern with external appearance, above-average incomes and education, and narcissism.[142] Suffice it to say that

134. Konnoth, *supra* note 133, at 337.

135. Hermann, *supra* note 80, at 509.

136. *Id.* at 503–04.

137. Konnoth, *supra* note 133, at 327–28 (Because "'gay life . . . was collectively . . . organized around stigma'" prior to the homophile movement, it was only later that homosexuals were able to "take a hand in producing their own identity categories to replace old ones.") (quoting DANA ROSENFELD, The Changing of the Guard: Lesbian and Gay Elders, Identity, and Social Change 63 (2003)).

138. *See* POSNER, *supra* note 102, at 301 (recognizing effeminacy in homosexual men, but expressing doubt that it is an artifact of social control).

139. *Id.* at 300–02.

140. *Id.* at 304.

141. DAVID M. HALPERIN, How to Do the History of Homosexuality 123 (2002).

142. POSNER, *supra* note 102, at 300–01. *See also* Romer v. Evans, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) (homosexuals reside in disproportionate numbers in certain communities, have a high disposable income, and possess political power). Many of these

external perceptions of homosexuals from across the last century have flourished.

As part of a wider movement that pushed the reexamination of human sexuality in the 1960s, homosexuals began a process of redefining homosexual identity. While older, more stigmatized associations endured, newer forms of homosexual identity began to emerge, notable because they largely developed internally, that is, by homosexual subgroups themselves.[143] Homosexual identity underwent another significant change during the AIDS pandemic, propelled by internal and external forces, as backlash from fears about AIDS[144] forced homosexuals to confront new misconceptions and a resurgence of negative external attention.[145]

At the turn of the century, shortly before *Lawrence* was decided, homosexual subculture and identity were unquestionably corporeal.[146] By then, homosexual social and political groups had developed into fairly large homosexual communities and fostered a subculture.[147] Homosexual identity possesses a longer history, nuanced by the influence of both external and internal pressures, but was likewise firmly established. A cognitive-based status component arises with the development of a subculture and identity, which—like a fundamental understanding and political voice—helps distance the conduct-based group from its underlying conduct and alter how the group is then treated.

Homosexuals possess all three features of a conceptually distinct conduct-defined group (fundamental understanding, political voice, and subculture and identity), and with each factor, illustrate that even though the group is defined by conduct at bottom, it has evolved well beyond. "Homosexuals" is not a mere label for those who engage in homosexual conduct. Rather, the group is far more vivid, and defies categorization based merely on underlying conduct. As such, the Court was prudent to grant the group special consideration and take into account that regulation

characteristics are exclusive to homosexual men. *Cf.* POSNER, *supra* note 102, at 300 (noting that society exerts much less pressure against lesbianism than against male homosexuality).

143. *See, e.g.*, Konnoth, *supra* note 133, at 327–28 (detailing how homosexual identity changed as a result of the African-American civil rights movement in the 1960s).

144. DIDI HERMAN, The Antigay Agenda: Orthodox Vision and the Christian Right 194–95 (1997) (arguing that while it may not be ill-fitting to characterize sentiment against homosexuals in the mid-1980s as a "backlash", many anti-gay developments were "being spearheaded by a social movement with a long history and a clear vision").

145. BAYER, *supra* note 75, at 199–200.

146. *See, e.g.*, POSNER, *supra* note 102, at 293 (recognizing and using nomenclature preferred by the "homosexual subculture").

147. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 98, 104–05 (2002) (recognizing the definitive emergence of a discrete homosexual subculture by the time *Bowers v. Hardwick* was brought to the Court in 1986).

of a group's underlying conduct had negative effects on the group itself. This holds true in the Court's other cases involving conduct-defined groups. Two additional examples will aid in the understanding of the contours of this framework.

IV. Other Conduct-Defined Groups

Treatment of homosexuals under rational-basis review is consistent with how the Court has dealt with other conduct-defined groups. Groups that exist beyond their underlying conduct are consistently afforded greater concern than groups that do not. In this section, two other conduct-defined groups will be similarly examined: hippies and physicians who assist suicides. An analysis using the proposed three-factor test reveals that the former possesses a fundamental understanding, political voice, and subculture and identity, while the latter does not. As this test predicts, the Court considered potential adverse effects on hippies, and declined to do so when the conduct-defined group consisted of physicians who assist suicide.

A. Hippies

Hippies—the countercultural group that emerged during the mid-1960s—became a targeted group under section 3(e) of the Food Stamp Act of 1964, as amended in 1971, which excluded any household containing two or more unrelated members from participation in the federal food stamps program.[148] Legislative history reveals that Congress created the amendment to "prevent so-called 'hippies' and 'hippie communes' from participating."[149] In *United States Department of Agriculture v. Moreno,* the Court held that the law "cannot be sustained by reference to this congressional purpose."[150] With a sweeping statement that was cited by the *Lawrence* Court a quarter century later, the Court opined that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[151]

Hippies emerged in the early 1960s as a "cultural protest"[152] of a young generation. This counterculture movement was based on a brand of philosophy but quickly evolved into a wholly new subculture,[153] espousing

148. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973); Food Stamp Act of 1964 § 3(e), 7 U.S.C. § 2012(e) (amended 1971).

149. *Moreno*, 413 U.S. at 534.

150. *Id.*

151. *Id.*

152. E.D. HIRSCH, The Dictionary of Cultural Literacy 419 (1993).

153. *Youth: The Hippies*, TIME MAG., July 7, 1967, *available at* www.time.com/time/magazine/article/0,9171,899555-1,00.html.

pacifism, free love, communal living, and drug use; and rejecting capitalist economics.[154] The subculture spawned "an almost childlike fascination in beads, blossoms, and bells, blinding strobe lights and ear-shattering music, exotic clothing and erotic slogans."[155] A distinctive subculture was present soon after the group's inception, and began to identify with different qualities and values in subsequent years.

A hippie political voice primarily espoused pacifism and was most clearly raised against the Vietnam War.[156] Hippies participated in non-violent demonstrations, the organization of political action groups, opposition to the draft, and refusal to serve in the military.[157]

By 1973, hippies were fundamentally understood. In the first few years, a general confusion over the aims and makeup of the group was evident.[158] Viewpoints often differed:

> One sociologist calls them "the Freudian proletariat." Another observer sees them as "expatriates living on our shores but beyond our society." Historian Arnold Toynbee describes them as "a red warning light for the American way of life." For California's Bishop James Pike, they evoke the early Christians: "There is something about the temper and quality of these people, a gentleness, a quietness, an interest—something good." To their deeply worried parents throughout the country, they seem more like dangerously deluded dropouts, candidates for a very sound spanking and a cram course in civics—if only they would return home to receive either.[159]

Understanding of hippies gradually increased as it became clearer what values and lifestyle the hippie subculture espoused, but in the mid-1970s and 1980s many hippies began a process of reintegration into mainstream society.[160]

Hippies as a group were originally defined by countercultural conduct that followed a brand of philosophy,[161] but it became quickly apparent that

---

154. *Id.*

155. *Id.*

156. DETLEF JUNKER ET AL., The United States and Germany in the Era of the Cold War, 1945–1990, at 424 (2004).

157. *Id.*

158. *See* Herb Caen, *Small Thoughts at Large*, S.F. Chron. June 25, 1967, at R-37, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/05/31/PK6016S108.DTL.

159. *Youth: The Hippies*, *supra* note 153.

160. DON LATTIN, Following Our Bliss: How the Spiritual Ideals of the Sixties Shape Our lives Today 74 (2004).

161. *Youth: The Hippies*, *supra* note 153 (hippie philosophy credits philosophers such as Diogenes of Sinope, and the Greek Cynics, as well as religious leaders such as Jesus Christ, Hillel

the conduct-defined group took on an independent vivacity that surpassed the underlying conduct. All three factors—understanding, political voice, and subculture and identity—are present. As such, the Court in *Moreno* recognized that the adverse effect on hippies, as a group, was relevant to the legitimacy of the state's interest under rational-basis review, which ultimately led the Court to conclude that the government could not seek to exclude hippie communes from a federal aid program.[162]

B. Assisted Suicide

The issue of physician-assisted suicide reached the Court in *Washington v. Glucksberg*[163] in 1997. Four physicians brought a substantive due process challenge against Washington's ban on "caus[ing] or aid[ing] another person to attempt suicide."[164] Like the ban on homosexual conduct in *Lawrence* and the denial of benefits to those living in a hippie commune in *Moreno*, the State enacted a ban on a course of conduct—assisting another person in a suicide attempt. The conduct-defined group consists of physicians who provided[165] that service. As we shall see, this group lacks all three of the factors that distinguish a conduct-defined group that exists beyond the course of conduct.

First, society lacks a basic understanding of the group. This is facially evident in the *Glucksberg* majority opinion, which focuses exclusively on the patients and contains almost no reference to the attending physicians. The Court found that Washington had three legitimate state interests: the "fear that permitting assisted suicide will start [the state] down the path to voluntary and perhaps even involuntary euthanasia,"[166] the protection of "vulnerable groups—including the poor, elderly, and disabled persons—from abuse, neglect, and mistakes,"[167] and "an unqualified interest in the

the Elder, Buddha, Mazdak, St. Francis of Assisi, Henry David Thoreau, and Gandhi, and even literary figures such as Aldous Huxley and J.R.R. Tolkien).

162. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973).

163. Washington v. Glucksberg, 521 U.S. 702 (1997).

164. *Id.* at 707; WASH. REV. CODE § 9A.36.060(1) (2011).

165. To be precise, the physicians challenging Washington's law in *Glucksberg* were "doctors [who] occasionally treat[ed] terminally ill, suffering patients, and declare[d] that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban," and not doctors who had already been engaged in assisting suicides. *Glucksberg*, 521 U.S. at 707.

166. *Id.* at 732–33. Euthanasia differs from assisted suicide by who acts to end the patient's life. In assisted suicide, the patient self-administers a lethal medication, but in euthanasia, a third party acts to directly end the patient's life. *ETHICS IN MEDICINE: PHYSICIAN AID-IN-DYING*, UNIV. OF WASH. SCH. OF MED., http://depts.washington.edu/bioethx/topics/pad.html (last visited Mar. 9, 2011).

167. *Glucksberg*, 521 U.S. at 731.

preservation of human life."[168] The Court's underlying concern lies with "the real risk of subtle coercion and undue influence in end-of-life situations,"[169] but does not expressly mention the attending physicians or the medical profession in general.[170]

The group also lacks a political voice. While the medical community at large may possess a great deal of political clout, the conduct-defined group (which is distinguishable) does not. The debate surrounding assisted suicide has been shaped by both physicians and laypersons. However, neither the group itself nor the medical community at large has expressed a strong unifying opinion on this issue. Examples like that of Dr. Kevorkian[171] can be found, but are atypical and should not be considered representative of the group.[172] Surveys of individual physicians show that roughly half believe that physician-assisted suicide is "ethically justifiable in certain cases,"[173] but professional organizations such as the American Medical Association, the American Nurses Association, and the American Psychiatric Association have "generally argued against [it] on the grounds that it undermines the integrity of the profession."[174] The practice is only now legal in three states: Oregon,[175] Montana,[176] and Washington.[177]

Finally, the group also lacks a subculture and identity. The medical community has reached a consensus on two central principles: "Physicians have an obligation to relieve pain and suffering and to promote the dignity of dying patients in their care,"[178] and "[t]he principle of patient bodily integrity requires that physicians must respect patients' competent decisions to forgo life-sustaining treatment."[179] Even though these

168. *Id.* at 728.

169. *Id.* at 732.

170. The Court's only substantive reference to the medical profession is a study on the practice of euthanasia in the Netherlands. *Id.* at 734.

171. *See* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994).

172. The group encompasses a much wider portion of the medical community; surveys indicate that about one in five practicing physicians will receive a request for physician-assisted suicide at some point in their career. *Ethics in Medicine: Physician Aid-in-Dying*, *supra* note 166.

173. *Id.*

174. *Id. See also* Brief of the American Medical Ass'n, the American Nurses Ass'n, and the American Psychiatric Ass'n et al. as Amici Curiae in Support of Petitioners, *Glucksberg*, 521 U.S. 702 (No. 96-110).

175. OR. REV. STAT. ANN. § 127.800-995 (1994) (Oregon's "Death with Dignity Act").

176. Baxter v. State, 224 P.3d 1211 (Mont. 2009).

177. WASH. REV. CODE § 70.245 (2008) (Washington's "Death with Dignity Act").

178. *PHYSICIAN-ASSISTED SUICIDE*, NORTHWESTERN UNIV., http://endoflife.northwestern.edu/physician_assisted_suicide_debate/what.cfm (last visited Mar. 9, 2011).

179. *Id.*

principles have particular bearing on this issue, physician-assisted suicide is not qualitatively different from other areas of medical practice. There is no substantive distinction between physicians who assist suicides and those who do not. While dealing with a request for hastened death requires a high degree of prudence from a physician, caution has been given against divorcing it from alternative palliative medicine, and nothing indicates that a physician's duties regarding physician-assisted suicide involve a marked difference in the standard of care.[180]

The group identified by the act of physician-assisted suicide lacks all three indicators, and cannot be said to exist beyond the confines of the underlying course of conduct. The Court thus did not consider adverse impact, and ultimately refused to invalidate Washington's ban on physician-assisted suicide under rational-basis review.[181]

Conclusion

Once conduct-defined groups have drifted from their conduct-defined mooring, they are given greater protection under substantive due process' rational-basis review, most clearly visible as explicit concern over possible adverse impact on the group. A basic understanding, a political voice, and a subculture and identity are three crucial features that this Note has identified as indicators for when a group originally defined by a course of conduct has evolved, and thus, receives special consideration.

These groups have received two forms of treatment under rational-basis review. This comes as no surprise, given the nature of tiered review and the proliferation of standards under the banner of "tiered review." On close examination, it is apparent that some conduct-defined groups receive special consideration—concern over potential adverse impact on the group—whereas others do not. Groups that have received this form of heightened treatment are readily distinguishable. Hippies and homosexuals qualify, while physicians who assist suicides do not.

This framework distinguishing among conduct-defined groups can apply to cases beyond substantive due process, and is germane to the level of deference given to groups in other constitutional playgrounds—notably the Equal Protection Clause and the First Amendment. With respect to the First Amendment, conduct like ritual animal sacrifice for religious purposes gives rise to conduct-defined groups of religious sects.[182] Turning to Equal Protection, illegally immigrating to this country as a child with

180. *Id.*

181. Washington v. Glucksberg, 521 U.S. 702 (1997).

182. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (decided under the First Amendment's Free Exercise Clause).

one's parents results in a groups that consists of undocumented alien children.[183] Both of these groups were targeted by conduct bans (from animal sacrifice and public education, respectively), and existed beyond the defining course of conduct. The Court in each case explicitly considered what adverse impacts of the ban on conduct had on each group, and ultimately struck both state laws down.

In contrast, committing a felony and dancing nude in an adult theater are both conduct that give rise to different groups: felons[184] and nude dancers,[185] respectively. These groups were the subject of similar, targeted conduct bans (on felons' ability to vote and nude dancing), but received different treatment—these groups never emerged beyond the defining course of conduct. The Court upheld these bans without reference to the impact these bans had on the group of individuals that engaged in the underlying conduct.

The Court's treatment of conduct-defined groups has often been implied; careful judges and able lawyers craft their language to shift the focus from conduct to group, or vice versa. But this simple dichotomy is ultimately misplaced. The relationship between a course of conduct and a conduct-defined group is nuanced, and requires careful examination. The Court has long afforded some conduct-defined groups special consideration by weighing the adverse effects on the corresponding group, but, it has withheld these special considerations for other groups, all under the banner of rational-basis review. Justice Marshall correctly noted that "[a]ll interests not 'fundamental' . . . are not the same,"[186] and the Court certainly does not pretend that they are. The Court's consideration of different conduct-defined groups is far from arbitrary; a principled distinction has emerged, despite the obfuscating effect of tiered review.

183. Plyer v. Doe, 457 U.S. 202 (1982) (decided under the Fourteenth Amendment's Equal Protection Clause).

184. Richardson v. Ramirez, 418 U.S. 24 (1974) (decided under the Fourteenth Amendment's Equal Protection Clause).

185. Barnes v. Glen Theaters, 501 U.S. 560 (1991) (decided under the First Amendment's Free Speech Clause).

186. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).